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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 RISKI PRODUCTIONS, INC., a
12 California corporation,

Plaintiff,

13 vs.

14 KAREN CARRADO, an individual, and
15 KAREN CARRADO as TRUSTEE on
16 behalf of the K. Carrado Trust,

Defendants.
17

CASE NO. 07cv1383-LAB (CAB)

**ORDER DENYING DEFENDANTS'
MOTION TO DISMISS OR STAY**

18 On July 27, 2007, Plaintiff Riski Productions, Inc. ("Riski") filed its complaint in this
19 case raising state-law claims against Defendant Karen Carrado ("Carrado"). The Amended
20 Complaint invokes this Court's diversity jurisdiction under 28 U.S.C. § 1332(a)(1). Carrado
21 filed a motion to dismiss or stay this action (the "Motion"), pointing out an apparently related
22 action, *Carrado v. Riski Prods.*, case no. 037-2007-00070981-CU-MC-CTL, is pending in
23 California state superior court. Riski is a California corporation with its principal place of
24 business in this District. Karen Carrado is a New Jersey resident and trustee of Defendant
25 K. Carrado Trust.

26 **I. Background**

27 The claims in this action arise from an agreement to sell a nightclub to Riski. The
28 Amended Complaint alleges Defendant Carrado signed the purchase agreement in her

1 capacity as President of TAG Enterprises (“TAG”), a corporation. It also alleges alterations
2 had been made to the building without the required permits and that neither Defendant
3 Carrado nor TAG disclosed this. It further alleges Riski could not afford to correct the
4 defects, which interfered with the nightclub’s profitability, and Riski was forced to sell the
5 nightclub at a loss. Riski seeks \$200,000 in damages and rescission of the purchase
6 agreement.

7 In support of their Motion, Carrado attaches the Second Amended Complaint for
8 Declaratory Relief filed in state court on October 3, 2007 (Amin Decl., Ex. F (“State Court
9 Complaint”).) Carrado points out the state court case has been pending since July 12, 2007
10 (Defs.’ Mem. at 5:2–6). Riski does not contest Carrado’s contention that the amended State
11 Court Complaint relates back to the complaint originally filed. Neither party has sought to
12 file any supplemental briefing showing developments of any importance in the state court
13 proceeding.

14 Carrado contends the claims raised in this action should in fact have been raised as
15 a compulsory counterclaim in the state court action, and the state court action will resolve
16 all issues raised in the federal action. Carrado also argues the doctrine of *Colorado River*
17 *Water Conservation Dist. v. United States*, 424 U.S. 800, 817–18 (1976) should be applied.
18 Carrado cites *Ritza v. Int’l Longshoremen’s and Warehousemen’s Union*, 837 F.2d 365, 369
19 (9th Cir. 1988) (citing 5 C. Wright & A. Miller, Federal Practice and Procedure § 1360 at
20 633–34 (1969)) for the principle that the Court may entertain other pre-answer motions, such
21 as motions to dismiss because another action is pending, even though such a motion is not
22 expressly provided for under the Federal Rules of Civil Procedure. She has not identified
23 any jurisdictional defects in this action nor are any apparent in the pleadings.

24 II. Discussion

25 Generally, the pendency of an action in state court is no bar to proceedings
26 concerning the same matter in federal court. *Colorado River*, 424 U.S. at 813. Ordinarily,
27 federal courts have “virtually unflagging obligation . . . to exercise the jurisdiction given
28 them,” so a stay or dismissal is appropriate only in exceptional circumstances. *Id.* at 817.

1 When those exceptional circumstances exist, however, a stay or even dismissal may be
2 appropriate. *Id.* at 818–21. The Court is mindful that the circumstances justifying application
3 of the *Colorado River* doctrine are “exceedingly rare.” *Smith v. Cent. Ariz. Water Conserv.*
4 *Dist.*, 418 F.3d 1028, 1033 (9th Cir. 2005).

5 Although several factors weigh for or against application of the *Colorado River*
6 doctrine, *Nakash v. Marciano*, 882 F.2d 1411, 1415–17 (9th Cir. 1989) (setting forth factors),
7 the Court must first determine whether the state and federal actions are parallel. *Enfission,*
8 *Inc. v. Leaver*, 408 F. Supp. 2d 1093, 1096 (W.D.Wash., 2005) (citing *Moses H. Cone Mem’l*
9 *Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 28 (1983)). The two proceedings need not be
10 exactly parallel; it is enough if the two are “substantially similar.” *Nakash* at 1415 (citations
11 omitted).

12 Carrado argues California law requires Riski to raise its claims by cross-complaint and
13 failure to do so would bar it from doing so in any other action. Cal. Code Civ. Proc. §
14 426.30(a). See also § 426.10(c) (defining “related cause of action”). If this were the case,
15 adjudication of the claims in state court would necessarily resolve the claims in this Court,
16 and the Court’s inquiry into whether the cases were “substantially similar” would be an easy
17 one. See *Casablanca Resorts, LLC v. Backus*, 2007 WL 951946, slip op. at *1 (D.Nev.,
18 March 28, 2007) (applying *Nakash* and finding that claims arising from the transaction or
19 occurrence that formed the subject matter of the claim in state court, which constituted
20 compulsory counterclaims under state law, were “substantially similar” to those asserted in
21 the pending federal action). Because the State Court Complaint seeks only declaratory relief
22 against Riski, however, under Cal. Code Civ. Proc § 426.60(c) Riski’s claims, though related,
23 need not have been raised in a cross-claim. *Russo v. Scrambler Motorcycles*, 56 Cal.App.3d
24 112, 117, 127 Cal.Rptr. 913 (1976).

25 While the theories of recovery are not the same, a review of the Amended Complaint
26 and the State Court Complaint reveals some overlap in the factual and legal issues
27 presented. Here, Riski alleges Defendant Carrado fraudulently induced it to purchase the

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1 nightclub, failing to inform it of permitting problems and thus deceiving it regarding the value
2 of the nightclub. Here, too, Riski seeks rescission of the purchase agreement.

3 In the state court action, Carrado charges Riski Productions with failing to make timely
4 payments. (State Court Complaint, ¶ 9.) Carrado seeks declaratory relief preventing Riski
5 Productions from prosecuting claims against her and finding her not liable for the permitting
6 problems which are the subject of the litigation in this Court. (*Id.*, ¶ 10 and 6:22–7:16.)
7 Carrado also argues she was not a party to the Purchase Agreement and seeks a
8 declaration so stating. (*Id.*, ¶ 18 and 6:23–26.) In addition, the parties are attempting to
9 litigate their respective rights and duties under the purchase agreement. (*Id.*, ¶ 24.) In other
10 words, confirmation of the purchase agreement's enforceability is a central object of that
11 litigation.

12 The parties are identical, and the permitting issue is closely related to that in the State
13 Court Complaint. The State Court Complaint alleges the parties agreed that Riski would sell
14 the nightclub to a third party and for that third party to make payments to the K. Carrado
15 Trust. (State Court Complaint, ¶ 9.) Furthermore, in this case Riski seeks rescission of the
16 purchase agreement which effectively litigates the purchase agreement's enforceability.

17 The State Court Complaint asks for a declaration that Defendant Carrado is not liable
18 for acts stated in the arbitration demand. (State Court Complaint at 7:1–14.) The arbitration
19 demand, attached as an exhibit to the Motion describes the nature of the claims to be
20 arbitrated as follows:

21 The dispute involves a failure to disclose material facts related to the
22 purchase and sale of a business, including an interest in real property.
23 Claimant, Buyer, purchased a bar business that included an out-door patio
24 bar from Respondent, Seller. Claimant allege[]s that Seller did not disclose
the fact that the patio bar was not permitted prior to purchase. Since
purchase, Claimant has suffered significant damages as a result.

25 (Decl. of Karen Carrado in Supp. of Motion, Ex. C (Arbitration Demand).) The respondents
26 are identified as Karen Carrado in her individual capacity and on behalf of TAG. (*Id.*) Thus,
27 the state court action seeks a declaration that Carrado is not liable for failing to disclose the
28 permitting problems, which is the issue here. Thus far, the cases are similar.

1 The standard for issuance of a stay under *Colorado River* is, however, exceptionally
 2 high, even if the Court is merely staying rather than dismissing the action. *Moses H. Cone*,
 3 460 U.S. at 27–28. A stay should be granted only if the Court “concludes that the parallel
 4 state-court litigation will be an adequate vehicle for the complete and prompt resolution of
 5 the issues between the parties.” *Id.* at 28. “[T]he decision to invoke *Colorado River*
 6 necessarily contemplates that the federal court will have nothing further to do in resolving
 7 any substantive part of the case, whether it stays or dismisses.” *Id.* (citation omitted). The
 8 Court must have “full confidence” the state court action will end the litigation; “the existence
 9 of a substantial doubt as to whether the state proceedings will resolve the federal action
 10 precludes the granting of a stay.” *Intel Corp. v. Advanced Micro Devices, Inc.*, 12 F.3d 908,
 11 913 (9th Cir.1993) (citing *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271,
 12 277 (1988)).

13 Riski argues the state action would not resolve all issues in the federal action (Opp’n
 14 to Motion, at 5:8–13, 7:3–8:16), which may be true. Without actually examining and
 15 resolving the claims at issue here, it is impossible to say whether the state court will grant
 16 or deny Carrado’s request for declaratory relief. The state court may grant her request for
 17 a declaration that she cannot be liable for failing to disclose the permitting problems. It may
 18 well deny her request, however, without necessarily finding her liable.

19 The state court could, for instance, agree with Carrado that she was not a party to
 20 either the purchase agreement and partial payment agreement (State Court Complaint, ¶ 18)
 21 and on that basis conclude she, in her individual capacity, was not party to any “actual
 22 controversy” with Riski regarding her rights and duties under the two agreements. (*Id.*,
 23 ¶¶ 24–26.) See Cal. Code Civ. Proc. § 1060 (authorizing actions for declaratory relief in
 24 cases of “actual controversy” between parties based on written agreements). “The ‘actual
 25 controversy’ requirement concerns the existence of present controversy relating to the legal
 26 rights and duties of the respective parties pursuant to contract, statute or order.” *Brownfield*
 27 *v. Daniel Freeman Marina Hosp.* 208 Cal.App.3d 405, 410, 256 Cal.Rptr. 240 (1989)
 28 (citations omitted). Or, the state court could find the controversy between Carrado and Riski

1 is merely anticipated in the future and not a present, live controversy. *Id.* It may also deny
2 relief if it finds she lacks evidence to show she is not liable without passing on the question
3 of whether Riski has adequate evidence to show she is liable. In other words, a denial of
4 declaratory relief would not necessarily resolve the federal case.

5 In *Intel*, the Ninth Circuit confronted a similar situation. There, concurrent state court
6 proceedings would have resolved all the issues only if the state court confirmed an
7 arbitration award and if the state court's decision had collateral estoppel effect in federal
8 court. 12 F.3d at 913. If, however, the state court had overturned the arbitration award,
9 further proceedings would be necessary in federal court. *Id.* The court therefore found
10 "substantial doubt" precluded a *Colorado River* stay. *Id.* If, as is the case here, the state
11 court's decision may — but need not — resolve the federal action, a *Colorado River* stay is
12 inappropriate. *City and County of San Francisco v. United States*, 930 F. Supp. 1348, 1352
13 n.2 (N.D.Cal. 1996) ("[I]f the state court action will moot the federal action only if one of many
14 possible resolutions are reached by the state court, a federal court may not stay the case
15 before it.") (citing *Intel*).

16 While Carrado persuasively argues that conducting related state and federal litigation
17 simultaneously is not the best or most efficient use of judicial resources, and maintenance
18 of concurrent actions could result in conflicting results, these problems alone are an
19 inadequate basis on which to grant a stay under *Colorado River*.

20 In *AmerisourceBergen Corp. v. Roden*, 495 F.3d 1143, 1151 n.13, 1154 (9th Cir.
21 2007), the Circuit reversed a district court's abstention where issues in federal and state
22 courts were not coextensive, but any federal court decision might have conflicted with state
23 court proceedings. Judge Ferguson's concurrence also analyzed the dismissal under
24 *Colorado River*. *Id.* at 1154–56. Though he opined that, "where a nearly identical case is
25 already pending in state court and there is clearly no federal question before the federal
26 court, the latter forum should be permitted to stay its proceeding pending the outcome of the
27 state suit," he nevertheless agreed that application of the *Colorado River* doctrine would
28 have been impermissible. The Supreme Court's holding in *Gulfstream* points out a federal

1 court will often appropriately deny a stay or dismissal under *Colorado River* until the propriety
2 of a stay or dismissal becomes clearer. 485 U.S. at 277–78 (explaining that denial of motion
3 for stay or dismissal under *Colorado River* was “inherently tentative” because a district court
4 may conclude it “should await further developments” such as the state case’s expansion or
5 its movement at a faster pace).

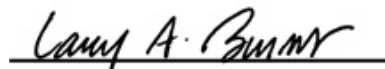
6 The Court therefore concludes a stay is unavailable. However, “given both the nature
7 of the factors to be considered under *Colorado River* and the natural tendency of courts to
8 attempt to eliminate matters that need not be decided from their dockets, a district court
9 usually will expect to revisit and reassess an order denying a stay in light of events occurring
10 in the normal course of litigation.” *Gulfstream*, 485 U.S. at 278. If, in light of developments
11 in state court, either of the parties believe application of the *Colorado River* doctrine
12 becomes appropriate during the pendency of the action here, they may then move again for
13 a stay or dismissal.

14 **III. Conclusion and Order**

15 For these reasons, the Motion is **DENIED WITHOUT PREJUDICE**.

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17 **IT IS SO ORDERED.**

18 DATED: September 29, 2008

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20 **HONORABLE LARRY ALAN BURNS**
21 United States District Judge
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